

13-3625-cv
Kirkland v. Cablevision Systems

1
2 **UNITED STATES COURT OF APPEALS**
3 **FOR THE SECOND CIRCUIT**
4

5 August Term, 2013
6

7 (Argued: June 19, 2014 Decided: July 25, 2014)
8

9 Docket No. 13-3625-cv
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11 GARRY KIRKLAND,
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13 *Plaintiff-Appellant,*
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15
16 – v. –
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18 CABLEVISION SYSTEMS,
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20 *Defendant-Appellee,*
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22
23 Before: CALABRESI, LYNCH, and LOHIER, *Circuit Judges.*
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25 Appeal from the orders, entered September 30, 2012 and August 23, 2013,
26 of the United States District Court for the Southern District of New York (Preska,
27 C.J.) granting summary judgment to Defendant-Appellee Cablevision Systems on
28 pro se Plaintiff-Appellant Garry Kirkland's Title VII discrimination claims.
29 Because Kirkland proffered adequate evidence that, if credited by a jury, could
30 support a favorable verdict on his Title VII discrimination and retaliation claims,
31 we VACATE the judgment of the District Court and REMAND for proceedings
32 consistent with this opinion.

33 GARRY KIRKLAND, New York, N.Y., *pro se.*

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2 JOSEPH A. NUCCIO (RENÉ M. JOHNSON, *on the brief*)
3 Morgan, Lewis & Bockius LLP, Princeton, N.J., *for*
4 *Defendant-Appellee.*
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8 PER CURIAM:

9 Pro se Plaintiff-Appellant Garry Kirkland appeals from two decisions by
10 the District Court (Preska, C.J.) granting Defendant-Appellee Cablevision
11 Systems (“Cablevision”) summary judgment and dismissing Kirkland’s Title VII
12 discrimination and retaliation complaint. According to Kirkland, who was, in
13 2008, Cablevision’s only African-American Area Operations Manager (“AOM”),
14 his former employer discriminated against him and ultimately fired him based
15 on race. Kirkland also argues that Cablevision retaliated against him for
16 repeatedly complaining to Human Resources about racial discrimination.

17 The District Court granted Cablevision summary judgment on Kirkland’s
18 Title VII race discrimination claims and denied it summary judgment on his
19 retaliation claims. *Kirkland v. Cablevision Sys.*, No. 09-cv-10235, 2012 WL 4513499,
20 at *4 (S.D.N.Y. Sept. 30, 2012). On motion for reconsideration, the District Court
21 granted Cablevision summary judgment on Kirkland’s retaliation claims and

declined to exercise jurisdiction over his pendent state law claims. *Kirkland v. Cablevision Sys.*, No. 09-cv-10235, 2013 WL 4509644, at *3 (S.D.N.Y. Aug. 23, 2013).

In awarding Cablevision summary judgment, the District Court overlooked evidence raising a genuine factual dispute as to whether Cablevision's justifications for firing Kirkland were a pretext for race discrimination and retaliation. A rational jury, viewing the disputed evidence in Kirkland's favor, could find that Cablevision discriminated against Kirkland and fired him in violation of Title VII. Summary judgment is, therefore, inappropriate.

We VACATE the District Court's orders granting Cablevision summary judgment on Kirkland's discrimination and retaliation claims and dismissing Kirkland's pendent state law claims, and REMAND for trial.

DISCUSSION

We assume the parties' familiarity with the facts and proceedings below.

"This court reviews grants of summary judgment de novo." *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003). Summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We

1 review the evidence and draw all rational inferences in the non-movant's favor.

2 *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

3 When a plaintiff proceeds pro se, the court must construe his submissions
4 liberally and interpret them "to raise the strongest arguments that they suggest."
5 *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994). Only "if it appears beyond
6 doubt that the plaintiff can prove no set of facts in support of his claim which
7 would entitle him to relief," will the court affirm summary judgment. *Terry*, 336
8 F.3d at 137 (internal quotation marks and alterations omitted) (vacating, in part,
9 a grant of summary judgment).

10 Kirkland's Title VII race discrimination and retaliation claims are subject to
11 the *McDonnell Douglas* burden-shifting standard.¹ *See Gorzynski v. JetBlue Airways*
12 *Corp.*, 596 F.3d 93, 106, 110 (2d Cir. 2010) (citing *McDonnell Douglas Corp. v.*
13 *Green*, 411 U.S. 792, 802 (1973)). To state a prima facie case of race discrimination,
14 a plaintiff must proffer evidence that (1) he belongs to a protected group; (2) he
15 was qualified for his position; (3) his employer took an adverse action against
16 him; and (4) the adverse action occurred in circumstances giving rise to an

¹ Kirkland does not appeal the District Court's dismissal of his cross-motion for summary judgment or its grant of summary judgment against him on his disparate treatment claim based on pay. Accordingly, we find those claims to be abandoned.

1 inference of race discrimination. *See Terry*, 336 F.3d at 138. To state a prima facie
2 case of retaliation under Title VII, a plaintiff must proffer evidence that he
3 engaged in a protected activity, such as complaining about race discrimination,
4 and that his employer took an adverse action in retaliation. *See Gorzynski*, 596
5 F.3d at 110.

6 Once an employee makes a prima facie case of either discrimination or
7 retaliation, the burden shifts to the employer to give a legitimate, non-
8 discriminatory reason for its actions. *See McDonnell Douglas*, 411 U.S. at 802. If
9 the employer does so, the burden then shifts back to the plaintiff to show that the
10 employer's explanation is a pretext for race discrimination or retaliation. *Id.*

11 With respect to a discrimination claim, "once the [employer] has made a showing
12 of a neutral reason for the complained of action, to defeat summary judgment . . .
13 the [employee's] admissible evidence must show circumstances that would be
14 sufficient to permit a rational finder of fact to infer that the [employer's]
15 employment decision was more likely than not based in whole or in part on
16 discrimination." *Terry*, 336 F.3d at 138 (internal quotation marks omitted). With
17 respect to a retaliation claim, the employee's admissible evidence must show
18 "that the unlawful retaliation would not have occurred in the absence of the

1 alleged wrongful action or actions of the employer.” *Kwan v. Andalex Grp. LLC*,
2 737 F.3d 834, 835 (2d Cir. 2013) (internal quotation marks omitted) (quoting *Univ.*
3 *of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013)).

4 While the District Court recognized that Kirkland had stated prima facie
5 cases of race discrimination and retaliation, it held that Kirkland lacked sufficient
6 evidence of pretext to rebut Cablevision’s seemingly legitimate, non-
7 discriminatory reasons for firing him—primarily, poor performance reviews and
8 affidavits from three regional managers whom Kirkland supervised.

9 We disagree with the District Court’s conclusions.

10 The record contains enough evidence that, if credited, could support a
11 jury’s finding that Cablevision’s rationale for Kirkland’s treatment and eventual
12 termination was a pretext for illegal race discrimination and retaliation.² For

² The District Court calculated the actionable period under Title VII as beginning April 19, 2008 (300 days prior to Kirkland’s EEOC charge, which was marked “received” by that office on February 13, 2009). *See Kirkland v. Cablevision Sys.*, No. 09-cv-10235, 2011 WL 4908367, at *11 (S.D.N.Y. Oct. 14, 2011) (recommendation from Magistrate Judge Fox, adopted by the District Court). We note that the record also includes an earlier-completed EEOC “questionnaire,” dated January 13, 2009. *See Appellees’ Special Appendix (“S.A.”) 753*. Kirkland testified that he first submitted a discrimination charge to the EEOC on December 5, 2008—the day after he was fired, S.A. 341—and that the EEOC documents dated 2009 are “amendments” to his original complaint,

1 example, Kathryn Nivins, an Asian-American female whom Robert Cockerill
2 hired to replace Kirkland, testified that Cockerill explained Kirkland's
3 termination by criticizing Kirkland's failure to discipline one of his regional
4 managers (all of whom were African-American). S.A. 320-21. Nivins testified
5 that Cockerill told her that Cockerill "ha[d] come to learn that they don't know
6 how to police each other." S.A. 321. Nivins also testified that, during her
7 interview, Cockerill gave her an "overview" of these managers' strengths and
8 weaknesses, explaining that "his opinion was that [the regional office] could
9 lighten up a bit." S.A. 321.

10 Other examples of proffered evidence, which could support a finding of
11 pretext, if at least several were believed, follow:

- 12 • Kirkland swore that when he and the other AOMs—the rest of
13 whom were white—gave presentations in September 2008 or 2009,
14 Cockerill cut Kirkland's time short and singled out Kirkland's
15 presentation for "heavy[]" criticism, including Cockerill's assertion
16 that Kirkland's presentation "used a colored background and [that]

S.A. 928, 1235. We set aside the question of whether an earlier date might commence the preceding actionable period under Title VII. Limiting our review to the actionable period considered by the District Court, we find sufficient evidence for reversal.

1 there is no room for color in a business presentation” and “how
2 white was better than color.” S.A. 757, 1155-56.

- 3 • Kirkland swore that Cockerill and Human Resources manager Isaac
4 Fennell falsified and back-dated documents that they used to
5 support Kirkland’s poor performance reviews “to cover up the real
6 reason for . . . firing [him].” S.A. 927-28. *See also* S.A. 86, 1135.

7 Kirkland’s claim is made plausible by Nivins’s testimony that
8 Cockerill asked her to gather negative “information” on Kirkland
9 “[r]ight after” Cablevision learned that Kirkland had sued. S.A. 321-
10 22, 324. Nivins also claimed that when she told Cockerill that she
11 “didn’t have that information for him,” Cockerill turned against her.
12 S.A. 322.

- 13 • Handwritten notes from Human Resources executive Sue Crickmore
14 include the following statement about three of Kirkland’s regional
15 managers: “These three not receptive to coaching.” S.A. 574 (notes
16 dated November 2008). The same three managers later submitted
17 affidavits criticizing Kirkland in support of Cablevision’s summary

1 judgment motion, which Kirkland testified “[he] wouldn’t be
2 surprised” if Cockerill had falsified. S.A. 1135.

- 3 • In August 2008, Kirkland reminded Fennell “that he had yet to
4 respond to [Kirkland] about [his February 2008] complaints of
5 retaliation” and race discrimination. S.A. 926, 929. *See also* S.A. 330
6 (describing a February 2008 meeting with Fennell), 338-39, 415.

7 Kirkland testified that, the day after his February 2008 meeting,
8 “Isaac [Fennell] sent me the email saying he want[ed] to follow up
9 on my issues . . . and I never heard from him again.” S.A. 1133, 423.

10 *See also* S.A. 235 (showing that an electronic meeting request, sent
11 from Fennell to Kirkland, suggested February 7, 2008 to discuss
12 “H[uman]r[esources] Confidential: Employee Concern”).

- 13 • During a November 10, 2008 meeting with Crickmore, Kirkland
14 again complained that no one had followed up with him about his
15 February 2008 allegations of race discrimination, which Kirkland
16 blamed for his poor performance review. S.A. 420-21, 337-39.

17 Crickmore’s notes from this meeting read: “G[arry] K[irkland] [:] Put
18 in a response re: review and never heard back.” S.A. 574.

- 1 • Crickmore's notes also could be read to support Kirkland's
2 testimony that he complained to her directly about Cockerill
3 "treating [him] differently" from the white AOMs, by, for example,
4 offering to deliver a warning to Kirkland's regional managers in
5 Kirkland's stead. S.A. 420. Crickmore's notes from November 11,
6 2008, entitled "Conversation with Isaac [Fennell] + Bob [Cockerill],"
7 ask, "Did Bob and Isaac offer[] to all AOM[s] to administer warning
8 to the[ir regional] managers?" S.A. 318.
- 9 • Fennell's report and handwritten notes from the December 4, 2008
10 meeting at which Fennell and Cockerill fired Kirkland include
11 Kirkland's statement that "[t]his appears to be retaliating after [his
12 November 2008] meeting with Sue Crickmore." S.A. 268, 270.
- 13 • Nivins testified that she believed that Cockerill hired her, despite
14 her lack of qualifications, because Cockerill wished to "us[e]" Nivins
15 as cover because she "ha[d] a black fiancé and [she] c[ould] fire
16 black people in [Kirkland's former] region." S.A. 324-25, 1101.
- 17 • Nivins also testified that she believed Cockerill was "racist," a
18 complaint she voiced to Fennell. S.A. 323. Nivins testified that

1 Fennell, in response, “blankly told [her] that Bob [Cockerill] is
2 known as the KKK without the hood.” S.A. 323-24.

3 A jury might credit all of this proffered evidence, some of it, or none at all.
4 But that is “left for the jury to decide at trial.” *Rivera v. Rochester Genesee Reg’l.*
5 *Transp. Auth.*, 743 F.3d 11, 21 (2d Cir. 2012) (vacating, in part, summary judgment
6 for employer). And if at least some of this evidence is believed by a jury, that
7 jury could also conclude that, despite Kirkland’s negative performance reviews,
8 his firing was “more likely than not based in whole or in part on discrimination,”
9 *Terry*, 336 F.3d at 138 (internal quotation marks omitted), and that the unlawful
10 retaliation would not have occurred “but-for” the alleged wrongful actions.

11 CONCLUSION

12 We vacate the orders of the District Court granting Cablevision summary
13 judgment on Kirkland’s Title VII race discrimination and retaliation claims and
14 dismissing his pendent state law claims. The case is remanded for proceedings
15 consistent with this opinion.